



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 22, 2006

Mr. Charles E. Box, Chairman
Illinois Commerce Commission
160 N. LaSalle Street
Suite 800
Chicago, IL 60601

Ms. Lulu M. Ford, Commissioner
Illinois Commerce Commission
160 N. LaSalle Street - Suite 800
Chicago, IL 60601

Mr. Robert F. Lieberman,
Commissioner
Illinois Commerce Commission
160 N. LaSalle Street - Suite 800
Chicago, IL 60601

Ms. Erin M. O'Connell-Diaz,
Commissioner
Illinois Commerce Commission
160 N. LaSalle Street - Suite 800
Chicago, IL 60601

Mr. Kevin Wright
Illinois Commerce Commission
527 North Capitol Avenue
Springfield, IL 62701-1827

Dear Chairman Box and Commissioners:

The People of the State of Illinois ("the People"), by and through Attorney General Lisa Madigan, write to object to the letter and "motion" that an organization calling itself "the Illinois Coalition for Jobs Growth and Prosperity" delivered to each Commissioner on June 19, 2006. The People object to both the form and substance of the Coalition's submission. There is no basis under Illinois law for the Commission to consider the Coalition's extra-procedural request, let alone grant it.

There is no authority to grant the Coalition's requests. Because the courts currently have jurisdiction over the orders that established the auction schedule, there can be no new proceeding to modify the schedule. There is also no lawful authority to "reconsider" these orders pursuant to 220 ILCS 10-113(a) or to "reopen" these dockets pursuant to 83 Ill. Adm. Code Part 200.900.

Because the courts currently have jurisdiction over the orders that established the auction schedule, there can be no new proceeding to modify the schedule.

On January 24, 2006, the Commission issued orders in docket nos. 05-0159 and 05-0160/61/62. In these orders the Commission approved "the first ten days of September 2006 . . . as the period for commencing the initial ComEd and Ameren auctions." Order, docket no. 05-0159, at 112; Order, docket nos. 05-0160/61/62, at 123. Several parties in those dockets filed timely applications for rehearing and subsequently filed timely petitions for review in the appellate courts.¹ Those appeals are currently pending before the appellate courts, as is a petition seeking direct Supreme Court review.²

The Public Utilities Act ("PUA") specifies the process by which the appellate court acquires jurisdiction over Commission orders on appeal and expressly states that:

The court first acquiring jurisdiction of any appeal from any . . . order or decision shall have and retain jurisdiction of such appeal and of all further appeals from the same . . . order or decision until such appeal is disposed of in such appellate court.

220 ILCS 5/10-201(a), emphasis added. While there is currently a dispute as to which district of the appellate court acquired jurisdiction and when, it is clear that the appellate court – and *not* the Commission – has had jurisdiction over the matters under review in ICC docket nos. 05-0159 and 05-0160/61/62 since at least early March, when the People of the State of Illinois filed Petitions for Review (and Notices of Appeal) with the Appellate Court, First District.

The filing of a notice of appeal divests a tribunal of jurisdiction to enter further orders of substance in a cause and transfers jurisdiction *instantly* to the appellate court. Thereafter, the lower tribunal may determine matters collateral or incidental to the judgment, but may not enter an order that would modify the judgment or its scope. *Brownlow v. Richards*, 328 Ill. App. 3d 833, 836-37, 767 N.E.2d 482 (1st Dist. 2002).

In both dockets (nos. 05-0159 and 05-0160/61/62), the Commission made specific findings that the record evidence supports holding the auction during the first ten days of September. Changing that key date would not be "collateral" or "incidental" to the Commission's January orders. The Commission cannot, therefore, open a new proceeding to modify the auction schedule while the orders in those dockets are on appeal.

¹ Appeal Nos. 1-06-0663, 1-06-0664, 1-06-0858, 1-06-0859, 1-06-0860, 1-06-0875, 1-06-0876, 1-06-0966, 2-06-0149, 2-06-0381, 4-06-0118, 4-06-0391, 4-06-0392, 4-06-0393.

² On June 1, 2006, the People of the State of Illinois filed a Petition for Direct Supreme Court Review Pursuant to Rule 302(b) and Motion for Stay in Illinois Supreme Court Case No. 102767.

There is no lawful authority to grant the Coalition's request for "reconsideration" of the orders issued in ICC Docket Nos. 05-0159 and 05-0160/61/62.

The Public Utilities Act ("PUA") does not specifically authorize "reconsideration" of Commission decisions, but does set forth procedures for "rehearing." 220 ILCS 5/10-113. Rehearing is defined as "[s]econd consideration of cause for purpose of calling to court's or administrative board's attention any error, omission, or oversight in first consideration." Black's Dictionary of Law, 5th ed, at 1157 (1979). Hence, the two terms are interchangeable, and the procedures that apply to requests for "rehearing" must also apply to requests for "reconsideration."

The PUA and Commission rules clearly define the procedures for seeking rehearing. The statute provides that "[w]ithin 30 days after the service of any . . . order or decision of the Commission *any party* to the action or proceeding *may apply for a rehearing*" 220 ILCS 10-113(a), emphasis added. ICC rules state that "[a]fter issuance of an order on the merits by the Commission, *a party may file an application for rehearing* . . . The application shall be filed *within 30 days* after service of the order on the party." 83 Ill. Admin. Code 200.880(a), emphasis added.

The Coalition's request for reconsideration/rehearing fails on two counts. First, the Coalition is too late – approximately five months too late. Second, the Coalition was *never* eligible to submit a request for reconsideration/rehearing in docket nos. 05-0159 and 05-0160/61/62 because the Coalition was not a party in these cases. The PUA does not authorize the Commission to grant untimely requests for rehearing/reconsideration by nonparties. The Coalition's request must, therefore, be denied.

There is no lawful authority to grant the Coalition's request to "reopen" ICC Docket Nos. 05-0159 and 05-0160/61/62.

ICC rules authorize the Commission to "reopen any proceeding when it has reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, such reopening." 83 Ill. Admin. Code 200.900. Even if the appellate court did not have jurisdiction over these matters, the Commission could not reopen docket nos. 05-0159 and 05-0160/61/62 for the reasons set forth by the Coalition. Indeed, the Coalition's claim that "seven (7) meritorious reasons exist that support . . . rescheduling" can be largely dismissed by simply noting that six of those seven "reasons" existed at the time the Commission issued the order scheduling the auction. Coalition Motion, at 3. Despite the existence of those "reasons," the Commission found that it was in the public interest to schedule the auction in September.

The Coalition does, however, identify one change of possible significance: "the Commission must retain a new auction advisor." *Id.* If the Commission actually had jurisdiction over this matter, an issue relating to the auction advisor might well provide a reason for reopening these dockets – but not the reason that the Coalition suggests. In fact, the Coalition's claim that the new auction advisor needs more time is directly contrary to the assurances offered by Commission staff at the "bidder-only" meeting held on June 7,

2006 in Rosemont. The real issue is that the former auction advisor, who assisted Commission staff throughout docket nos. 05-0159 and 05-0160/61/62 and appeared as a Commission witness in those dockets, is reportedly being replaced because of a conflict of interest. *See attached.* That conflict of interest could be a valid basis for reopening *all* of the issues in these dockets, if the Commission had jurisdiction to do so. .

The Coalition's requests should be rejected.

For the reasons discussed above, the Coalition's requests should be rejected. The Commission lacks jurisdiction to modify the orders in docket nos. 05-0159 and 05-0160/61/62 while these orders are on appeal. Even if the Commission had jurisdiction, there is no authority to "reconsider" these decisions pursuant to 220 ILCS 10-113(a) or to "reopen" these dockets, pursuant to 83 Ill. Adm. Code Part 200.900, on the grounds offered by the Coalition. The Coalition's requests should therefore be rejected.

Respectfully,

Lisa Madigan
Attorney General of Illinois

By: 

Susan Hedman
Senior Assistant Attorney General

ICC terminates contract of power auction consultant

By Steve Daniels
May 22, 2006

(Crain's) — The Illinois Commerce Commission has terminated the contract of an outside consulting firm hired to monitor the upcoming power auction system that will set future electricity rates for commonwealth Edison Co. and its customers.

Bids are due early next month to replace ERS Group, the Emeryville, Calif.-based consultancy the commission had hired to advise it on September's auction, a commission spokeswoman says.

The commission, which regulates utilities, removed ERS Group for an unspecified conflict last month, the commission spokeswoman says.

Higher wholesale power prices, expected to be reflected in the September auction, are expected to lead to a hefty rise in ComEd rates once a 9-year-old freeze on power rates expires at the end of this year. ComEd has forecasted a rate hike of up to 20% while other observers predict the increase will be far larger.

Once the auction is complete, the commission will have just three days before it has to decide whether or not the bidding was conducted properly. Based on that finding, it will reject or approve the results. The consultant will play a key role in advising the regulators on that decision.